DMK v Republic (Criminal Appeal E050 of 2022) [2024] KEHC 3400 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3400 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E050 OF 2022

GL NZIOKA, J

APRIL 11, 2024

BETWEEN

DMK .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the decision of Hon Y. O Barasa, Senior Resident Magistrate (SRM) delivered on 13th July 2021 in Criminal Case Sexual Offence No. 63 of 2020 at the Chief Magistrate's Court at Naivasha)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of *Sexual Offences Act* (herein "the Act") vide the Chief Magistrate's Criminal Case S/O No. 63 of 2020. He was also charged in the alternative count with the offence of committing an indecent act with a child contrary to section 11(1) of the Act. The particulars of each count are as per the charge sheet.

2. The charges were read to the appellant and he pleaded not guilty thereto. The case proceeded to full hearing. The prosecution called a total of four (4) witnesses. The prosecution case in brief is that, in the month of December 2019 the complainant (PW1) "SN" aged 15 years old was staying with her cousin AMN (PW2) and the appellant, who is AMN's husband.

3. That, the appellant and the wife were staying in a single room house, wherein the complainant was sleeping on a chair separated from the appellant's bed by a curtain. That when the wife was away, he would defile the complainant on several occasions against her will.

4. That, the defilement act continued for so long until it was discovered, when the complaint missed her monthly menstrual period. That she was taken to hospital and upon examination she was found to be pregnant. She moved out of the house to stay with one Ruth but the appellant took her back. That

eventually she delivered a baby boy with full knowledge and assistance of the appellant who took her to hospital.

5. The complainant testified that, three months after delivery the child became sick and died. That the child was called BMM, named after appellant's father. In the meantime, the matter was reported to the police officers who arrested the appellant and charged accordingly after the investigations.

6. In addition to the evidence of the victim, the prosecution led further evidence through PW2 AMN who is the complainant's cousin and whom she was staying with, PW3- Benjamin Kuria Gacuiri produced medical reports; P3 Form and Post Rape Care Form.

7. At the conclusion of the prosecution case, the court ruled that the appellant had a case to answer and placed him on his defence. He testified that, he was staying with Ann (PW2) and the complainant. That, in the month of December 2019 they parted ways with PW2, Ann, and she swore to do 'something" that he would never forget.

8. That when he was arrested he knew PW2, Ann, had fixed him by framing the charges against him. He denied committing the offences herein. In cross-examination he stated that, he knew the complainant, but did not know she was a child. He told the court that, he had no grudge with complainant and took her to hospital after she delivered. He denied taking possession of the birth notification card and giving the child a name.

9. At the conclusion of the case, the trial court delivered a judgment dated, 13th July 2021 and found the appellant guilty on the main count, convicted him and sentenced him to serve twenty (20) years imprisonment.

10. However, the appellant being aggrieved by the conviction and sentence has appealed against it on the grounds as here below reproduced:

    a. That, the appellant pleaded not guilty in the instant case;

    b. That, the learned trial magistrate erred in law and facts when she convicted the appellant in a prosecution case where age was not proved;

    c. That, the learned trial magistrate erred in law and fact to when she convicted the appellant in the prosecution case where penetration was not proved;

    d. That, the learned trial magistrate erred in law and fact by applying wrong standards of proof in criminal case which was a standard of probability instead of reasonable doubt;

    e. That, the learned trial magistrate erred in law and fact by convicting the appellant but did not consider the appellant's defence of alibi;

    f. That, I pray to be present during the hearing of this appeal.

11. However, the respondent opposed the appeal vide grounds of opposition that states as follows: -

    a. That the age of the complainant was sufficiently proved as provided in the required standard under section 8 (3) of the *Sexual Offences Act*. The birth certificate was produced as an exhibit.

    b. That the penetration was proved to the required standards as required under section 8(3) of the *Sexual Offences Act* through the evidence of PW1 the victim and PW4 the doctor who examined her.

c. That identification of the appellant was established as well known to the victim.

d. That the trial court considered the appellant defence and subsequently dismissed it.

e. That the trial court found that the prosecution had proved its case beyond reasonable doubt.

f. That the trial court found the appellant guilty and sentenced him to twenty (20) years imprisonment.

g. That we pray that the Honourable court uphold the sentence of the trial court based on the circumstances of this case.

12. The appeal was disposed of by filing of submissions. The appellant filed submission on 17th March 2023 and argued that, the prosecution failed to prove the age of the complainant, as the assessment of age report was not produced nor the maker called to testify and explain the method used to arrive at the alleged age.

13. That, the age of the complainant is of importance as it determines the sentence to be imposed as held by the Court of Appeal in the case of; Hadson Ali Mwachongo vs Republic [2016] eKLR and Alfayo Gombe Okello vs Republic Cr. App No. 203 of 2009 (Kisumu), and therefore the failure of the prosecution in proving the complainant's age prejudiced him greatly.

14. The appellant submitted that, he reasonably believed the complainant was an adult. That, they were in a relationship until PW2, Ann, interfered with it. He relied the provisions of section 8 (5) and (6) of the *Sexual Offences Act* and further argued that, the complainant's behaviour led him to believe that she was an adult and was thus deceived. He placed reliance on the case of Eliud Waweru vs Republic (2020) eKLR.

15. He argued that the *Sexual Offences Act* need to be amended to adopt legislation of jurisdictions such as England where they only criminalize sex with persons less than sixteen (16) years old. He further argued that, while the complainant had not attained the age of majority, she had reached the age of discretion whereby she could make intelligent and informed decision about her body. He relied on the case of; Gillick vs West Norfolk and Wisbech Area Health Authority [1985] ALL ER 402 where it was stated that imposing fixed limits on nature was a lack of realism and the law must be sensitive to human development and social change.

16. The appellant further, relied on the case of; R vs Howard [1965] 3 ALL ER where Lord Parker stated that in prosecuting the charge of rape of a girl under the age of 16 the Crown must either prove lack of consent, or that she was not in a position to consent or resist.

17. That, the complainant was not a credible witness as she gave contradictory information on whether she had finished school or dropped out and when she stopped going to school. Furthermore, the complainant told the court that she did not want the appellant arrested but was influenced by PW2, Ann, who reported the matter.

18. Lastly, the appellant faulted the trial court for failing to consider his defence which would have led it to arrive at different conclusion, and argued that in the circumstances, the conviction was unsafe. Furthermore, the sentence, being the mandatory minimum, was harsh and excessive.

19. However, the respondent in submissions dated 6th March 2023, argued that the prosecution proved its case beyond reasonable doubt. That, penetration was proved through the evidence of the complainant which was cogent, and was corroborated by PW4, Benjamin Kuria Gacuiri, the clinical officer who examined the complainant. Further, the trial court took note that the complainant gave birth to a boy who the appellant named after him.

20. Further, the complainant's age was proved through the production of an age assessment that indicated the complainant was fifteen (15) years old. On the issue of identification, the complainant lived with the appellant who was married to her mother, PW2, Ann, and was therefore her step-father.

21. The respondent submitted that, the appellant abused his role as a care giver and a father and got the complainant pregnant and in the circumstance the court should uphold the sentence imposed by the trial court.

22. At the conclusion of the arguments by the respective parties and in considering the submissions of the respective parties, I note that, as held by the Court of Appeal in the case of; Okeno vs. Republic (1972) EA 32, the role of the first appellant court, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.

23. In that matter, the court stated as follows: -

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that, the trial court has had the advantage of hearing and seeing the witnesses"

24. Be that as it may, the offence of defilement is provided for under section 8(1) of the *Sexual Offences Act* which states: "A person who commits an act which causes penetration with a child is guilty of an offence termed defilement"

25. In that regard, a case of defilement is proved if three elements are established being; the age of the victim, who must be a child or minor, penetration and the proper identification of the perpetrator.

26. The afore ingredients were considered in the case of; Agaya Roberts vs. Uganda, Criminal no. 18 of 2002, and Bassita Hussein vs. Uganda Crimial Appeal No. 35 of 1995, the Supreme Court of Uganda where court stated that, in order to constitute the offence of defilement the following must be proved: (i) the facts of the sexual intercourse (ii) the age of the victim being under 18 years (iii) participation by the accused in the alleged sexual intercourse.

27. As regard the age of the victim, it must be established the victim is a child. The *Children Act*, No. 29 of 2022 defines a child as; "child" means an individual who has not attained the age of eighteen years; and that "age" means the actual chronological age of the child from conception or the child's apparent age as determined by a Medical Officer in any case where the actual age of the child is unascertainable.

28. Further it is settled law that, primary evidence in proof of the age of a person is the birth certificate or a medical report and/or a document prepared by a competent medical practitioner. However secondary

evidence can be deduced from the evidence of a parent or guardian, or physical observation of the child and/or common sense as held in; Hilary Nyongesa vs Republic (Uganda) HCCRA No. 123 0f 2009.

29. In the instant matter the complainant testified on 25th January, 2021, that she was 15 years old. In cross examination she reiterated she was 15 years old and that she left home when she was 14 years old. That she does not have a birth certificate as it got burnt in the house. That was confirmed by the cousin (PW2). In re-examination she stated that she was taken for age assessment and established to be 14 years old.

30. Be that as it may, the complainant was recalled on 8th March 2021 she was recalled and reiterated that she was taken for age assessment 0n 31st August, 2020 and found to be 15 years old. She identified the age assessment report which was marked as MFii That her birth certificate indicated that she was born on 5th December, 2020, but was not produced. Subsequently the age assessment report was produced by PW3 PC Peter Ouma, as prosecution exhibit ii. The appellant never objected to its production so the issue of calling the maker does not arise.

31. Pursuant to the definition of the age under the *Sexual Offences Act*, the age assessment report issued at Naivasha County Referral Hospital in respect of the complainant dated 31st August 2020 is sufficient proof of her age as 15 years old and supports the particulars of the charge. I find and hold that the ingredient of age was proved.

32. As regards penetration, the term is defined under the *Sexual Offences Act* as "penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person. As a result of the afore the prosecution has to prove there was partial or complete penetration.

33. The evidence of PW1 is that, the appellant defied her severally to an extend that he made her pregnant and bore a boy child. That he even took her in as a wife and they stayed together. That he promised to make her his wife. She further testified that she was taken for medical examination and it confirmed that she had been defiled through penal penetration. Of course the appellant generally denied the offence.

34. To reconcile the evidence of the complainant and the appellant, I find that, the medical report, being the P3 form and the PRC form indicated that the complainant had an episiotomy scar, no membrane tissue, no physical injuries of outer genitalia. The report further indicates that the injuries noted are consistent with the history of defilement. Consequently, the report corroborates the complainant's evidence of penetration and adequate proof of the same.

35. The final ingredient is proof of the perpetrator. The complainant identified the appellant as the perpetrator and testified that she was residing with him in the same house for a period of one (1) year and seven (7) months. That he was her cousin's husband. PW2, Ann Nanjala corroborated that evidence that the complainant is her cousin and they were staying together with her and the appellant. It therefore follows that the complainant and the appellant were not strangers.

36. The complainant further told the court that when the appellant learnt that she was pregnant and her cousin PW2, Ann, asked her who was responsible, she told her it was the appellant. PW2 Ann told the court that when she inquired from the complainant who made her pregnant, she was reluctant to disclose and asked her again and she kept quiet. That she asked the appellant and he said he was responsible. That after some time the appellant ran away from home.

37. That the appellant told the complainant she would give birth to a baby boy after he learnt of her pregnancy. That he took her to hospital and wanted a scan done. Further she went to stay with one, Ruth and afterwards moved to Karagita to stay with the appellant after she gave birth.

38. The complainant further testified that:

> " It is the accused who defiled me. The baby was called Brighton Muhochi Murumbi. It is the accused who gave him the name. Murumbi is the accused's name"

39. It suffices to note that the appellant did not cross examine the complainant over that evidence. PW2 too testified that; "I learnt the girl moved to stay with the accused" and it is the appellant who took her to hospital. Further, "it is the appellant who took the deceased's child's birth notification card", and that the appellant knew the complainant was a child as she was not going to school.

40. PW3 PC Peter Ouma the investigating officer testified that the appellant's statement at the police station was more of a "confession" but of course cannot be taken as such, since the same was not recorded under the relevant provision of the law. Be that as it may, it is inclined to support the evidence of PW2 that the appellant took responsibility for the complainant's pregnancy.

41. The appellant's defence was a denial of the offence and instead shifting blame to PW2, Ann, whom he alleged framed him so as to end their relationship and return to her "ex-lover". In cross examination PW2, Ann, denied that allegation of a grudge and a quarrel between them to enable her return to her old relationship.

42. The question that arises is whether; the defence is credible. In that regard, I note that in cross examination of the appellant by the prosecution he confirmed to court that the complainant had no grudge with him. It suffices to note that, PW2, Ann testified that the appellant was very defensive of the complainant while they were staying together.

43. Further the appellant stated that the complainant was not willing to report the matter and indeed it is PW2, Ann, who reported it, which suggest that, the complainant was not ready to support the appellant's arrest and prosecution and therefore unlikely to allow herself to be used by PW2, Ann, to frame the charges against the appellant.

44. Furthermore, it was the evidence of the complainant that the appellant recalled her from the house of Ruth and they went to stay together and he is the one who took her to hospital to deliver. If the complainant was staying with him, it is likely she would buy the alleged frame up charges.

45. However, the most critical evidence that seem to render the defence untenable is the content of the birth notification card issued after the child was born. It indicates the name of the child as "Brigton Murutu Keya", the mother as Sarah Nanjala and that it was issued to the appellant Dickson Murumbi, Identity No. 32897533. If this is frame up charges, where did the hospital get the personal details of the appellant and why would it indicate the card was issued to the appellant, if it was not?

46. In fact, the information on the card corroborates the evidence of PW1 and PW2 that the appellant took the complainant to hospital for delivery and discharged whereupon he obtained the birth notification card.

47. But even then, the defence advanced by the appellant in the trial court has been rendered as untruthful, dishonest, untenable and a mere denial by his submissions in this matter.

48. The appellant denied the offence in the trial court, however in the submissions herein he states that, he believed that the complainant was of age and had a relationship with her. It is therefore clear that the appellant is hanging on "anything" to try and exonerate himself from the offence and his submissions instead of aiding him supports the prosecution case. Further, submissions at appellant stage can never be a defence to a criminal charge in a trial case.

49. The last issue relates to the DNA that was not conducted. The same should have been carried on father of the child. However, the child died before it was done, but failure to carry out DNA does not exonerate the appellant from blame.

50. In Evans Wamalwa Simiyu vs Republic [2016] eKLR the Court of Appeal stated that:

> "
>
> "(19) Another issue for consideration is the contention by the appellant that the trial Court failed to order a DNA test on him contrary to section 36 of the *Sexual Offences Act* which evidence could have exonerated him. In AML v Republic 2012 eKLR (Mombasa), this Court upheld the view that:
>
> "The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."
>
> [20] This was further affirmed in Kassim Ali v Republic Cr Appeal No 84 of 2005 (Mombasa)(unreported) where this Court stated that:
>
> "The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."
>
> (21) Moreover, section 36 of the *Sexual Offences Act* that gives the trial court powers to order an Accused person to undergo DNA testing uses the word "may".
>
> Therefore the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her."

51. The evidence adduced and summarized herein was sufficient to sustain a conviction on the main count and the trial court was well guided in finding the appellant guilty thereon and convicting him.

52. The sentence meted out upon conviction is well stated under the law and is lawful.

53. The upshot is that the appeals lacks merit and it is dismissed in its entirety. Right of appeal 14 days,

DATED, DELIVERED AND SIGNED ON THIS 11TH DAY OF APRIL, 2024.

GRACE L. NZIOKA

JUDGE

In the presence of:

Appellant virtually

Mr Abwajo for the respondent

Ms Ogutu: Court Assistant

Page | 4